Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

(24)

No. 99-1257

In The Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

---

BRIEF OF RESPONDENT STATES OF OHIO, MICHIGAN AND WEST VIRGINIA

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
JUDITH L. FRENCH*
ELISE W. PORTER
JAMES G. TASSIE
Assistant Attorneys General
Office of the Attorney General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 466-2872
Counsel for Respondent State of Ohio

*Counsel of Record

[Additional Counsel Listed on Inside Cover]

BEST AVAILABLE COPY

54pp

MARK J. RUDOLPH
Deputy Chief
Office of Legal Services
West Virginia Division of
Environmental Protection
1356 Hansford Street
Charleston, West Virginia 25301
(304) 558-9160
Counsel for Respondent State of West Virginia

JENNIFER M. GRANHOLM
Attorney General of Michigan
THOMAS CASEY
Solicitor General
ALAN F. HOFFMAN
PAMELA J. STEVENSON
Assistant Attorneys General
Natural Resources Division
300 S. Washington, Suite 315
Lansing, Michigan 48917
(517) 373-7540
Counsel for Respondent State of Michigan

RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected the Environmental Protection Agency's (EPA's) standardless interpretation of Sections 108 and 109 of the Clean Air Act (the Act), and remanded under *Chevron* for EPA to fashion and apply a proper interpretation of the Act.

2. Whether the court of appeals had jurisdiction to review, as a final agency action ripe for review, EPA's promulgation of a revised National Ambient Air Quality Standard (NAAQS) for ozone.

3. Whether EPA had authority to promulgate and implement a NAAQS for ozone different from the ozone NAAQS and implementing requirements set by Congress in Subpart 2 of Part D of the Act.

TABLE OF CONTENTS

Page

RESTATEMENT OF THE QUESTIONS PRESENTED....i

TABLE OF AUTHORITIES.....vi

INTRODUCTION.....1

COUNTERSTATEMENT OF THE CASE.....2

I. THE STATUTORY FRAMEWORK.....2

II. THE OZONE RULEMAKING.....4

A. The 1996 Proposal; EPA's Interim Policy...4

B. The 1997 Rulemaking.....6

III. THE D.C. CIRCUIT DECISION.....7

SUMMARY OF ARGUMENT.....8

ARGUMENT.....10

I. THE COURT NEED NOT ADDRESS THE NON-DELEGATION QUESTION.....10

II. EPA HAS NO AUTHORITY TO REVISE THE OZONE STANDARD OR THE IMPLEMENTING REQUIREMENTS SET BY CONGRESS IN SUBPART 2.....10

TABLE OF CONTENTS - Continued

Page

A. EPA's Revision Of The Ozone Standard And Implementing Requirements Conflicts With Subpart 2 And, Therefore, Is Unlawful. 13

1. EPA's revised standard conflicts with the one-hour standard codified in Subpart 2 14

2. EPA's revised standard conflicts with the classifications and attainment dates set by operation of law in Subpart 2 16

3. EPA's revised standard changes the state planning requirements imposed by Subpart 2 19

4. EPA's revised standard conflicts with Congress's overall approach to implementing and attaining a national ozone standard. 21

TABLE OF CONTENTS - Continued

Page

B. The Act Offers EPA No Authority To Revise The One-Hour Ozone Standard Or To Implement A New Standard 26

1. The Act offers EPA no general authority to designate ozone nonattainment areas, to classify those areas, or to set dates for attainment of a revised ozone standard 26

2. The Act offers EPA no general authority to revise the one-hour ozone standard 28

III. EPA'S ACTION TO REVISE THE ONE-HOUR STANDARD AND IMPLEMENT A NEW STANDARD WAS A FINAL AGENCY ACTION RIPE FOR REVIEW 32

A. The Court Need Not Address The Questions Of Finality Or Ripeness 32

B. Consideration Of Traditional Notions Of Finality And Ripeness Leads Inevitably To The Conclusion That EPA's Rulemaking Was Final Agency Action Ripe For Review 33

TABLE OF CONTENTS - Continued

Page

1. EPA's rulemaking was "agency action" within Section 307 of the Act 34

2. The entire rule constitutes "final" agency action that is judicially reviewable.....35

3. EPA's action is ripe for review.....38

CONCLUSION.....40

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967).....38
American Trucking Associations, Inc. v. United States Environmental Protection Agency,
175 F.3d 1027 modified, 195 F.3d 4
(D.C. Cir. 1999).....passim
Bennett v. Spear,
520 U.S. 154 (1997).....35
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984).....11, 12
Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,
333 U.S. 103 (1948).....35
Davis v. Michigan Department of Treasury,
489 U.S. 803 (1989).....22
Dayton Board of Ed. v. Brinkman,
433 U.S. 406 (1977).....12
ETSI Pipeline Project v. Missouri,
484 U.S. 495 (1988).....11
Federal Trade Commission v. Standard Oil,
449 U.S. 232 (1980).....34
Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,
___ U.S. ___, 120 S. Ct. 1291 (2000) .....passim
MCI Telecommunications Corp. v. American Telephone & Telegraph Co.,
512 U.S. 218 (1994).....11, 13, 31

TABLE OF AUTHORITIES - Continued

Page

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983).....39
Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970).....35
United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).....12

REGULATIONS

40 C.F.R. 50.9(b).....7, 33, 36
40 C.F.R. 50.10(a).....6
40 C.F.R. 51.390.....38
40 C.F.R. Part 93, Subpart A.....38

STATUTES

Clean Air Act;
42 U.S.C. 7401 *et seq.*.....2
Clean Air Act §101(b);
42 U.S.C. 7401(b).....11
Clean Air Act §107;
42 U.S.C. 7407.....27, 28, 30, 36
Clean Air Act §107(d);
42 U.S.C. 7407(d).....37
Clean Air Act §107(d)(1);
42 U.S.C. 7407(d)(1).....18, 26, 27, 37

TABLE OF AUTHORITIES - Continued

Page

Clean Air Act §107(d)(4);
42 U.S.C. 7407(d)(4).....27
Clean Air Act §108;
42 U.S.C. 7408.....2, 29
Clean Air Act §109;
42 U.S.C. 7409.....2, 11, 28
Clean Air Act §109(a);
42 U.S.C. 7409(a).....29
Clean Air Act §109(b);
42 U.S.C. 7409(b).....2, 29
Clean Air Act §109(d);
42 U.S.C. 7409(d).....2
Clean Air Act §110;
42 U.S.C. 7410.....2
Clean Air Act §172;
42 U.S.C. 7502.....27, 28, 30
Clean Air Act §172(a);
42 U.S.C. 7502(a).....26
Clean Air Act §172(a)(1);
42 U.S.C. 7502(a)(1).....27, 28, 37
Clean Air Act §172(a)(2);
42 U.S.C. 7502(a)(2).....18, 28
Clean Air Act §172(b);
42 U.S.C. 7502(b).....37
Clean Air Act §173;
42 U.S.C. 7503.....37
Clean Air Act §173(a)(1);
42 U.S.C. 7503(a)(1).....37
Clean Air Act §173(a)(2);
42 U.S.C. 7503(a)(2).....37
Clean Air Act §173(a)(5);
42 U.S.C. 7503(a)(5).....37

TABLE OF AUTHORITIES - Continued

Page

Clean Air Act §176;
42 U.S.C. 7506 37
Clean Air Act §176(c);
42 U.S.C. 7506(c) 37
Clean Air Act §181;
42 U.S.C. 7511 .....passim
Clean Air Act §181(a);
42 U.S.C. 7511(a), ...8,17
Clean Air Act §181(a)(1);
42 U.S.C. 7511(a)(1), ...14, 16, 17, 30
Clean Air Act §181(b)(1), (2);
42 U.S.C. 7511(b)(1), (2),.....14, 16
Clean Air Act §181(b)(2);
42 U.S.C. 7511(b)(2), ...14, 19
Clean Air Act §181(b)(4);
42 U.S.C. 7511(b)(4), ...19
Clean Air Act §182;
42 U.S.C. 7511a.....3, 19, 20, 21
Clean Air Act §182(a)(1);
42 U.S.C. 7511a(a)(1).....21
Clean Air Act §182(a)(3);
42 U.S.C. 7511a(a)(3).....21
Clean Air Act §182(e)(3);
42 U.S.C. 7511a(e)(3).....20
Clean Air Act §182(g)(1);
42 U.S.C. 7511a(g)(1) 20
Clean Air Act §183;
42 U.S.C. 7511b 4
Clean Air Act §184;
42 U.S.C. 7511c.....4
Clean Air Act §185(B);
42 U.S.C. 7511f 4

TABLE OF AUTHORITIES - Continued

Page

Clean Air Act §307;
42 U.S.C. 7607 .....10, 34
Clean Air Act §307(b)(1);
42 U.S.C. 7607(b)(1) 33, 34
5 U.S.C. 551(13).....34
42 U.S.C. 7502 (1988).....2

FEDERAL REGISTER

61 Fed. Reg. 65716 (1996) 4
61 Fed. Reg. 65752 (1996) 4
61 Fed. Reg. 65754 (1996) 5
61 Fed. Reg. 65756 (1996) 6
61 Fed. Reg. 65757 (1996) 6
61 Fed. Reg. 65761 (1996) 6
62 Fed. Reg. 38856 (1997) 6
62 Fed. Reg. 38857 (1997) 6
62 Fed. Reg. 38863 (1997) 6
62 Fed. Reg. 38867 (1997) 6
62 Fed. Reg. 38873 (1997) 7, 36
62 Fed. Reg. 38883 (1997) 6
62 Fed. Reg. 38885 (1997) 7
62 Fed. Reg. 38894 (1997) 7, 33, 36
65 Fed. Reg. 45182 (2000) 29
65 Fed. Reg. 45185 (2000) 29

TABLE OF AUTHORITIES - Continued

Page

LEGISLATIVE HISTORY

H.R. Rep. No. 101-490 (1990), reprinted II Senate Comm. on Env. And Public Works, 103[d] Cong., 1st Sess., *Legislative History of the Clean Air Act Amendments of 1990*, (1993) ("1990 Legislative History").....passim
H.R. Conf. Rep. No. 101-952 (1990) reprinted in 1 1990 *Legislative History* 16, 20
Senate Debate (January 23, 1990), reprinted in II *1990 Legislative History* at 4837 (statement of Sen. Chafee).....20
Senate Debate (October 27, 1990), reprinted in I *1990 Legislative History* at 948 (comments of Sen. Chafee).....20
H.R. 2323, 101[st] Cong., Section 181(e) (1989), as introduced, reprinted in II *1990 Legislative History* at 4060.....15
S. Rep. 100-231 (1987), reprinted in V 1990 *Legislative History*.....25
S. Rep. 101-228 (1989) reprinted in V 1990 *Legislative History* at 8350.....22, 23, 25
S. 1894, 100[th] Cong., Section 402 (1987), as reported, reprinted in VI 1990 *Legislative History* at 9390.....25
S.Doc. No. 248, 79[th] Cong., 2[nd] Sess. 255 (1946) 35

MISCELLANEOUS

38 *Admin. L. Rev.* 363, 370 (1986).....13

INTRODUCTION

This case asks a question this Court has answered many times – whether the acts of an administrative agency go beyond the authority granted by Congress. Although the case arises in a scientific context and a complex regulatory scheme, the legal principles are quite simple.

An administrative agency has only those powers granted by Congress. An agency's ordinary and general powers may not override Congress's specific instruction and limitation with respect to a particular action or program. And, wherever Congress has expressed its intent, an agency may not take conflicting action.

Here, these basic rules apply to limit the power of the United States Environmental Protection Agency (EPA). Ten years ago, Congress spoke clearly and comprehensively to the problem of ozone control in this country. Recognizing the failure of the existing approach, the complexity and uncertainty of the science, and the enormous costs associated with compliance, Congress created a detailed program that balances realistic expectations and requirements for continuing progress.

But just six years later, before Congress's plan had reached even mid-stream, EPA began dismantling it. Although EPA struggled, throughout its rulemaking, to define the limits of its authority to take these actions, EPA apparently has resolved that struggle here, now arguing that it may change Congress's plan at any time and in whatever manner it chooses. As the court of appeals recognized, if EPA had such unlimited authority, the congressional scheme would have been stillborn had EPA taken this action immediately after Congress acted. Congress could not have intended such an illogical result, and, applying the most basic of legal principles, EPA's actions in pursuit of such an unauthorized end must be reversed.

COUNTERSTATEMENT OF THE CASE

I. THE STATUTORY FRAMEWORK

Prior to amendment in 1990, the Clean Air Act, 42 U.S.C. 7401 *et seq.* (the Act, cited as CAA), applied an identical statutory program for ozone and five other specified pollutants, *i.e.*, pollutants for which EPA issued criteria for meeting air quality. Section 109 of the Act, 42 U.S.C. 7409, required EPA to establish a national standard (a National Ambient Air Quality Standard or NAAQS) for each of these pollutants. The Act also required EPA to review and revise the criteria and standards every five years and to "promulgate such new standards as may be appropriate" in accordance with Section 108, 42 U.S.C. 7408, which requires EPA to establish criteria, and Section 109(b), 42 U.S.C. 7409(b), which requires EPA to set national standards requisite to protect the public health. CAA §109(d); 42 U.S.C. 7409(d).

Once EPA set the national standards, Section 110 of the Act, 42 U.S.C. 7410, required each State to develop a plan (a State Implementation Plan or SIP) to implement its own mix of air pollution control strategies for meeting each standard in each defined "area" of the State. Each state plan had to provide for attainment of the national standard within five years of the 1977 amendments to the Act, with the possibility of a five-year extension. In this way, the Act required that all areas of the country not meeting the primary ozone standard, no matter how far from attainment, come into compliance "as expeditiously as practicable but not later than December 31, 1987." 42 U.S.C. 7502 (1988).

By 1990, Congress recognized that its historic approach to compliance – simply commanding that all States meet each standard by a fixed date – had failed with regard to ozone. Many areas had not met the ozone standard; some

were a long way from doing so. Congress responded to this continuing ozone problem by developing a new approach and enacting a unique program for ozone. In Subpart 2 of Part D of the amended Act, CAA §§181-185B, 42 U.S.C. 7511-7511f, Congress created an elaborate plan for achieving national compliance with the ozone standard, and specified measures that would ensure continued compliance in the future. Integral to that program is the one-hour, 0.12 parts per million (0.12 ppm) standard, which Congress codified in Subpart 2.

As described more fully below, "by operation of law," Subpart 2 classifies areas that have not achieved the standard ("nonattainment areas") based upon their design value, which is a rough measure of whether an area complies with the one-hour, 0.12 ppm ozone standard. A table in Subpart 2 establishes classifications ranging from Marginal to Extreme, depending on how far an area is from meeting the standard, and provides a specific date by which the areas within each class must attain the standard (an "attainment date"). CAA §181; 42 U.S.C. 7511.

Subpart 2 also specifies state plan requirements for each class. The scheme begins with requirements applicable to Marginal areas, and then adds increasingly more stringent requirements for each additional classification further from attainment. These plan requirements include mandatory pollution control measures, annual emission reductions, and offsets for emissions from new or modified stationary sources. Congress anticipated that these requirements would apply well into the future, and that they would continue to apply, not only during the 20-year period before the final attainment date, but until all areas of the country meet the 0.12 ppm, one-hour standard. CAA §182; 42 U.S.C. 7511a.

In addition to the designation, classification, and planning requirements, Subpart 2 includes other

requirements: interstate ozone transfer control, CAA §184; 42 U.S.C. 7511c; EPA guidelines for sources of chemicals that are precursors to the formation of ozone, CAA §183; 42 U.S.C. 7511b; and studies that EPA must conduct, the results of which must be reported to Congress, *e.g.*, CAA §185B; 42 U.S.C. 7511f. As the court of appeals recognized, "Subpart 2 is the Congress's comprehensive plan for reducing ozone levels throughout the country." *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027, 1046, modified, 195 F.3d 4 (D.C. Cir. 1999); Petitioner's Appendix (Pet. App.) at 33a.

II. THE OZONE RULEMAKING

On July 18, 1997, EPA changed Congress's plan for achieving a national ozone standard. On that date, EPA gave final notice of its revision of the national standard for ozone, changing the standard from the one-hour limit of 0.12 ppm set by Congress, to an eight-hour limit of 0.08 ppm, and imposing requirements different from those in Subpart 2.

Cross-Petitioners, at pages 4-11 of their brief in Case No. 99-1426, comprehensively discuss the ozone rulemaking. The Respondent States adopt that discussion and simply highlight here those aspects of the rulemaking that relate most directly to the issues of EPA's authority under Subpart 2 and the finality and ripeness of EPA's action.

A. The 1996 Proposal; EPA's Interim Policy

EPA first proposed to revise the one-hour standard in a notice of proposed rulemaking in 1996. 61 Fed. Reg. 65716 (1996). At the same time, EPA issued an "Interim Implementation Policy on New or Revised Ozone and Particulate Matter (PM) National Ambient Air Quality Standards (NAAQS)." 61 Fed. Reg. 65752 (1996). While this interim policy served only as guidance and did not bind

the States or the general public as a matter of law, EPA issued the policy to "ensure momentum is maintained by the States in the current program while moving toward developing their plans for implementing" the new standards. *Id.* As such, it represented EPA's preliminary views on implementation of a new ozone standard.

EPA's interim policy plainly stated that, in EPA's view, the specific requirements of Subpart 2 do not directly apply to implementation of a new or revised ozone standard. It confirmed that EPA intended to revoke the one-hour standard for an area immediately upon EPA's approval of a revision to the state's plan (SIP) for achieving the new standard in that area. 61 Fed. Reg. 65754 (1996). EPA noted, however, that certain aspects of the 0.12 ppm, one-hour standard would be lifted immediately, even before states submitted plans to achieve the new standard.

First, the requirement to demonstrate attainment of the one-hour standard by the attainment dates set forth in Subpart 2 would no longer be necessary because those dates "will be superseded by a new requirement to attain the new NAAQS by new dates." 61 Fed. Reg. 65754 (1996). This followed from EPA's belief that "it is appropriate for areas to shift their efforts to develop attainment demonstrations from the existing NAAQS to the new NAAQS." *Id.*

Second, EPA, through this guidance, revoked the provisions for reclassification of an area if it failed to meet the one-hour standard by the applicable attainment dates in Subpart 2. EPA stated that such areas "need not have to comply with the additional specified control measures that they would have been subject to had they been reclassified in accordance with the provisions of subpart 2." *Id.*

Finally, EPA discussed its intent to change and/or revoke many of the program requirements imposed under

Subpart 2. As for attainment demonstrations for Serious, Severe, and Extreme areas, EPA recognized that many of these areas had been unable to complete plan requirements within the schedules provided by Subpart 2. As such, in light of EPA's planned promulgation of a new standard, "EPA believes that after promulgation of a new or revised ozone NAAQS, States should no longer be required to provide full demonstration-of-attainment SIP's for the 1-hour NAAQS; however, States are obliged to continue attainment planning toward the new NAAQS." 61 Fed. Reg. 65756 (1996). Meanwhile, EPA proposed to permit States to submit urban modeling to establish emissions reductions, "but not the specific measures necessary to attain the 1-hour NAAQS by the attainment dates set forth in subpart 2." *Id.* *See also* 61 Fed. Reg. 65757 (1996)(proposing to change the requirements for Marginal and Moderate areas); 61 Fed. Reg. 65761 (1996)(proposing to change the requirements for review of new sources of air pollution).

B. The 1997 Rulemaking

On July 18, 1997, EPA published a final rule that issued a new eight-hour, 0.08 ppm standard, which became effective on September 16, 1997. 40 C.F.R. 50.10(a); 62 Fed. Reg. 38857 (1997). EPA stated that it based this new standard on a "policy" judgment that the new standard is "sufficient[]" in light of "hazards that research has not yet identified" and "uncertainties associated with inconclusive scientific and technical information." 62 Fed. Reg. 38856, 38857, 38863, 38867 (1997). EPA also asserted the right to render a decision that follows "no generalized paradigm" that "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric," and that is "largely judgmental in nature." *Id.* at 38883.

EPA acknowledged that at the time of its first proposal, it had interpreted the Act in such a way that the

provisions of Subpart 2 would not apply to existing nonattainment areas once a new standard became effective. EPA stated in its final rulemaking, however, that it had "reconsidered that interpretation and now believes that the Act should be interpreted such that the provisions of subpart 2 continue to apply to [ozone] nonattainment areas for purposes of achieving attainment of the current 1-hour standard." 62 Fed. Reg. 38873 (1997). Once an area attains the one-hour standard, however, Subpart 2 would no longer apply. *Id.* To codify this interpretation, EPA issued as a final rule 40 C.F.R. 50.9(b), which states, "The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." 62 Fed. Reg. 38894 (1997).

EPA's action thus imposed two standards for parallel implementation: the eight-hour standard for areas that met the one-hour standard, and the one-hour standard for areas that did not. For the areas where the new eight-hour standard would apply, EPA's action imposed the implementing requirements that apply to other pollutants and that applied to ozone prior to 1990. 62 Fed. Reg. 38885 (1997).

III. THE D.C. CIRCUIT DECISION

In the D.C. Circuit, the petitioning States and industry groups (Respondents here) argued that Subpart 2 codified the one-hour, 0.12 ppm standard and provided the exclusive means for ozone regulation; therefore, EPA could not promulgate a new ozone standard. No party, including EPA, distinguished "revision of the standard" and "designation as nonattainment" from "enforcement" or "implementation" of that revised standard or nonattainment designation. The court, however, did make that distinction. The court held, first, that EPA may revise the ozone standard and, based on that revised standard, may designate areas as nonattainment, but, second, that EPA may not implement the revised

standard or otherwise implement the designation in a way that conflicts with Subpart 2. *See* Pet. App. at 1a, 70a. The court remanded, but did not vacate, the new eight-hour standard on the basis that the standard would not "engender costly compliance activities" in light of its decision that the standard "cannot be enforced by virtue of" Section 181(a) (42 U.S.C. 7511a). 175 F.3d at 1057; Pet. App. at 57a.

In response to the D.C. Circuit's opinion, EPA argued for the first time in a petition for rehearing, as it argues here, that its decision to change the ozone standard was not a final agency action ripe for review. Instead, EPA argued, the court's jurisdiction ended with its review of whether the statutory provisions at issue precluded EPA from promulgating the revised standard. On rehearing, the court rejected EPA's ripeness argument and determined that EPA's action was final and that it was ripe for review. 195 F.3d at 10-13; Pet. App. at 77a-79a.

SUMMARY OF ARGUMENT

In 1990, Congress created a comprehensive structure for ozone regulation – Subpart 2. That structure codifies the national one-hour standard of 0.12 ppm, classifies areas according to how far they are from achieving that standard, sets specific dates by which these areas, according to their classifications, must attain a specific ozone reduction, and imposes planning requirements upon States to ensure continuing progress. This comprehensive scheme and the legislative history to its enactment show that Congress rejected the old approach to ozone regulation – simply commanding States to comply with a standard by a certain date – and instead took a more realistic approach to nationwide ozone compliance.

The EPA action at issue here dismantles that structure. EPA's action changes the one-hour, 0.12 ppm

standard to a more stringent eight-hour, 0.08 ppm standard, changes the classifications and attainment dates, and changes the state planning requirements. Even more, EPA's action ignores Congress's overall approach to ozone regulation and returns the States to the unrealistic and ineffective scheme that Congress abandoned in 1990.

EPA has no authority to take these actions. EPA may not exercise its authority in a way that is inconsistent with the administrative structure that Congress enacted into law in Subpart 2. Although courts generally defer to an agency's interpretation of the statute it administers, an agency must give effect to the unambiguously expressed intent of Congress. Here, Congress's express intent is that Subpart 2, including the one-hour, 0.12 ppm standard and the comprehensive implementing requirements, is the exclusive scheme for ozone regulation in this country and EPA may not take action in conflict with it.

Nor will EPA find in the Act more general provisions that give broader authority. The provisions upon which EPA relies expressly exempt from its general authority the power to designate ozone nonattainment areas or to classify and set ozone attainment dates. In addition, EPA's general authority to revise standards is limited to "appropriate" changes. Since EPA is unable to designate or classify ozone nonattainment areas or to set attainment dates for such areas, it was not "appropriate" for EPA to revise the one-hour standard.

Correctly framed, this case is not merely about implementation of a revised standard, as EPA suggests. Rather, it is about EPA's authority to revise the standard in the first instance, *i.e.*, its power to revoke Congress's plan for regulation of ozone and to set into motion requirements for state action to implement a new and different standard. As EPA concedes, promulgation of an air standard is undoubtedly "agency action" and subject to review under

Section 307 of the Act, 42 U.S.C. 7607. Thus, EPA's rulemaking leaves no doubt that the issues before this Court are subject to judicial review.

Finally, even under traditional notions of finality and ripeness, the serious consequences that flow immediately from EPA's action leave no doubt that it is sufficiently final and ripe for review. These inevitable consequences also demonstrate the substantial and widespread impact of EPA's changes. For better or worse, however, Congress has spoken clearly and comprehensively to the control of ozone in this country. Congress having spoken, EPA may not abrogate the congressional plan.

ARGUMENT

I. THE COURT NEED NOT ADDRESS THE NON-DELEGATION QUESTION.

As the Respondent States argued in a brief in support of Cross-Petitioners in the companion case, No. 99-1426, interpreting the Act in a way that permits consideration of costs and other non-health factors avoids the need to reach the constitutional, non-delegation question (Question 1). Instead, as Cross-Petitioners and our co-Respondents assert, the Court should vacate EPA's particulate matter standard and remand to the Agency for further proceedings. No comparable remand of EPA's ozone standard is necessary, however, because, as argued below, EPA had no authority to revise the one-hour ozone standard.

II. EPA HAS NO AUTHORITY TO REVISE THE OZONE STANDARD OR THE IMPLEMENTING REQUIREMENTS SET BY CONGRESS IN SUBPART 2.

The Clean Air Act places upon EPA and the States the joint responsibility "to protect and enhance the quality of

the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." CAA §101(b); 42 U.S.C. 7401(b). EPA must promulgate national air standards; the States must implement them. CAA §§109, 110; 42 U.S.C. 7409, 7410. To be sure, EPA's duty to promulgate standards is a responsibility of the highest order. Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988). Accord *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994). And even though agencies are generally entitled to deference in the interpretation of the statutes they administer, a reviewing "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See also Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, ___ U.S. ___, 120 S.Ct. 1291, 1300 (2000).

In this case, EPA argues that it may revise and implement an ozone standard that is different from Subpart 2 because Congress expressed no other intent. To argue this, EPA looks first to the general provisions of the Act. The proper beginning point for determining Congress's intent with respect to ozone, however, is Congress's comprehensive program for ozone, Subpart 2. To argue that Congress did not express an intent to preclude EPA from revising the one-hour standard or implementing a standard differently, EPA must overlook the key components of Subpart 2 – the standard, the classifications and attainment dates, and the state planning requirements. EPA must also overlook the overall structure that these and other provisions combine to create and the intent that Congress expressed in Subpart 2's overall regulatory scheme. While EPA may choose to see

neither these key components nor the overall structure, as described below, a clear view of Subpart 2 reveals Congress's comprehensive scheme for ozone regulation and EPA may not take action in conflict with it.[1]

Nor may EPA look beyond Subpart 2 to find more general provisions that appear to give EPA contrary authority, as the Act offers none. Even beyond Subpart 2, Congress consistently expressed the intent that Subpart 2 was the sole mechanism for ozone regulation and that EPA has no authority to ignore or dismantle it.

If any doubt remains, this Court's inquiry into whether Congress has directly spoken to the precise question at issue is shaped, as it was in *Brown & Williamson*, "at least in some measure, by the nature of the question presented." *Id.*, 120 S.Ct. at 1314. A court premises deference to an agency's construction of a statute that it administers on the theory that a statute's ambiguity constitutes an implicit directive from Congress to the agency to fill in the statutory gaps. *See Chevron,* 467 U.S. at 844. This Court has recognized, however, that in some cases "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Brown & Williamson*, 120 S.Ct. at 1314, citing Breyer, Judicial Review of

[1] Although EPA understandably does not challenge the D.C. Circuit's finding that EPA has the authority to revise the ozone standard, Respondents are not precluded from arguing that that decision is incorrect. "A prevailing party, without cross-petitioning is 'entitled under [this Court's] precedents to urge any grounds which would lend support to the judgment below.'" *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994), quoting *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 419 (1977). As we argue here, if EPA cannot revise the standard, this Court must affirm the lower court judgment because there would be no standard for EPA to implement.

Questions of Law and Policy, 38 *Admin. L. Rev.* 363, 370 (1986)("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration"). Accord *MCI v. AT&T*, 512 U.S. at 231. As the court of appeals recognized, this is just such a case. As the express language of the Act, the legislative history, and the overall statutory scheme show, Congress left no gap for EPA to fill. Instead, Congress expressed its intent that Subpart 2 be the exclusive scheme for ozone regulation. EPA may not change Congress's plan.

A. EPA's Revision Of The Ozone Standard And Implementing Requirements Conflicts With Subpart 2 And, Therefore, Is Unlawful.

From 1977 until 1990, the Clean Air Act sought to control ozone, as it did the other specified pollutants, by simply commanding all areas of the country to achieve a set standard by a specific deadline. By 1990, however, it was clear that this "one size fits all" approach was not working for ozone. Many areas had still not achieved the standard; some were a long way from doing so. With knowledge of this failure, instead of simply waving its "magic wand" again and commanding States to comply by a certain arbitrary date, H.R. Rep. No. 101-490 (1990), reprinted in II Senate Comm. on Env. and Public Works, 103^{d} Cong., 1st Sess., *Legislative History of the Clean Air Act Amendments of 1990*, at 3170-71 (1993) ("*1990 Legislative History*"), Congress crafted a unique and more realistic approach to ozone compliance – Subpart 2.

As described below, EPA's ozone rulemaking changes Congress's approach for areas that have met the one-hour standard, and EPA argues before this Court that it has

the authority to go even further, to change this approach for all areas throughout the country. EPA Brief at 20. As the court of appeals recognized, if EPA had such unlimited authority, Congress's "scheme would have been stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments." 175 F.3d at 1050; Pet. App. at 42a. Congress could not have intended such an illogical result, and EPA's actions in pursuit of such an end must be reversed.

1. EPA's revised standard conflicts with the one-hour standard codified in Subpart 2.

When Congress amended the Act in 1990, it codified the one-hour, 0.12 ppm ozone standard existing at the time. Congress did so in Section 181, which classifies areas according to their "design value," which is a measure of whether an area complies with the 0.12 ppm, one-hour standard. CAA §181(a)(1); 42 U.S.C. 7511(a)(1).[2] Section 181, indeed all of Subpart 2, begins from this fundamental point and implements this specific one-hour, 0.12 ppm standard. Table 1 classifies areas based on the 0.12 ppm measurement and the extent to which the area is measured to be 0.121 ppm or above. CAA §181(a)(1), Table 1; 42 U.S.C. 7511(a)(1), Table 1. All designations are measured from this standard, as are redesignations and reclassifications if an area falls out of attainment or misses an attainment deadline. CAA §181(b)(1), (2); 42 U.S.C. 7511(b)(1), (2).

[2] The "design value is the fourth-highest daily maximum ozone concentration in an area over three consecutive years for which there are sufficient data. If that value is less than or equal to 0.12 ppm, then an area will have only three expected values above that level and it will be in attainment with the ozone NAAQS." 175 F.3d at 1046 n. 6; Pet. App. at 32a n.6.

Any reading of Section 181 that removes the references to the one-hour, 0.12 ppm standard would result in completely nullifying that section – a result surely not intended by Congress. It provides, in clear and simple terms, that areas are classified, designated, and reclassified according to this one-hour, 0.12 ppm standard. Any other reading simply revokes Table 1 in its entirety.

In fact, the legislative history suggests that Congress considered whether EPA should have the authority to revise the one-hour standard and rejected that approach. The version of Section 181 introduced in H.R. 2323 specifically provided for revised ozone standards:

> If the Administrator revises the national primary ambient air quality standard for ozone after the enactment of this subpart, the Administrator shall, within 6 months after the revision, promulgate requirements applicable to all areas which have not attained that standard as of the date of such revision and shall require revisions in the applicable implementation plans for such areas within 18 months after such revision.

H.R. 2323, 101st Cong., Section 181(e) (1989), as introduced, reprinted in II *1990 Legislative History* at 4060. Although portions of H.R. 2323 would ultimately find their way into the final bill, the House Health and Environment Subcommittee rejected this provision in favor of H.R. 3030.[3]

[3] The final version of the Clean Air Act Amendments of 1990, as reported in H.R. Conf. Rep. No. 101-952 (1990), reprinted in I *1990 Legislative History* at 1451, was an amalgamation of a Senate bill (S. 1630) and two House bills (H.R. 3030 and 2323). The version of S. 1630 that Congress ultimately enacted was virtually identical to H.R. 3030 as passed by the House. *See* House Debate (May 23, 1990), reprinted in II *1990 Legislative History* at 3019.

See House Debate (May 21, 1990), reprinted in II *1990 Legislative History* at 2533. Congress's rejection of this provision supports the conclusion that Congress intended to codify the 0.12 ppm ozone standard as the final bill did not refer to the Administrator's authority to revise the ozone standard established in Subpart 2.

In short, the fundamental building block of Section 181 and, therefore, Subpart 2, is Congress's codification of the one-hour, 0.12 ppm ozone standard. EPA's attempt to change that standard necessarily changes the congressional scheme and, therefore, goes beyond EPA's authority under the Act.

2. EPA's revised standard conflicts with the classifications and attainment dates set by operation of law in Subpart 2.

Congress's sensible response to the failure of the old approach to controlling ozone was to codify the existing standard, classify areas according to how far they were from achieving that standard, and then set specific dates by which these areas, according to their classification, must attain a specific ozone reduction. This cascading approach to ozone attainment not only allowed areas furthest from attainment of the 0.12 ppm standard the most time to achieve the one-hour standard, but it also imposed upon those areas the most stringent requirements to assist getting there. Congress presented the initial framework for this approach in Section 181 of the Act.

Section 181 provides classifications and attainment dates for each area designated nonattainment for ozone, as these designations existed at the time of enactment *and as they may be revised in the future*. CAA §181(a), (b); 42 U.S.C. 7511(a), (b). Section 181 designates these areas "by

operation of law" as Marginal, Moderate, Serious, Severe or Extreme, according to how far they are from meeting the 0.12 ppm standard. *Id.*

Section 181(a)[4] also includes Table 1, which sets out, for each classification (Marginal through Extreme), a date by which to attain a standard of 0.12 ppm. CAA §181(a); 42 U.S.C. 7511(a). For each of these areas, "the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1." *Id.* In the case of Severe and Extreme areas, these attainment dates have not yet occurred. *See* Table 1 (for Severe areas, the date is 2005; for Extreme areas, it is 2010).

Congress enacted Subpart 2 precisely because the controls of Subpart 1 had failed to bring areas into attainment with the 0.12 ppm standard. *See* H.R. Rep. No. 101-490 (1990), reprinted in II *1990 Legislative History* at 3169-74. Rather than treating all areas alike, as EPA now proposes, Congress gave areas, depending on their classification, between three and 20 years to attain the one-hour, 0.12 ppm standard. Since Subpart 2 extended the time for nonattainment areas to comply with the one-hour standard, Subpart 2 necessarily precludes EPA from requiring areas to comply either more quickly or with a more stringent ozone standard.

---

[4] In Part II.A. of their brief, Respondents *American Trucking Associations, et al.* (ATA) respond to EPA's argument that the title of Section 181(a) limits the application of Table 1's classifications and dates to those designations based on the one-hour standard and, by a great leap of logic, allows EPA to apply different classifications and attainment dates to designations based on a revised standard. As ATA explains, the reference to "1989 nonattainment areas" is the result of an easily explained oversight and, in any event, does not affect Section 181's interpretation.

Section 172 (in Subpart 1 of the Act) generally requires areas to comply with a primary standard "as expeditiously as practicable, but not later than 5 years from the date such area was designated nonattainment." CAA §172(a)(2)(A); 42 U.S.C. 7502(a)(2)(A). If EPA and the States were to take the full time authorized in Subpart 1 for making attainment designations and EPA were to approve every possible extension for each area, all nonattainment areas would have until 2012 to comply with the new eight-hour, 0.08 ppm standard. CAA §107(d)(1)(A)-(B); 42 U.S.C. 7407(d)(1)(A)-(B); CAA §172(a)(2)(A), (C); 7502(a)(2)(A), (C). "Such wide discretion is inconsistent, however, with Subpart 2, in which Congress stripped EPA of discretion to decide which ozone nonattainment areas should receive more time to reach attainment." 175 F.3d at 1049; Pet. App. at 40a.

Moreover, Section 181 gives Los Angeles, the nation's only Extreme Area, until 2010 to attain the one-hour, 0.12 ppm ozone standard, and the possibility of extending that deadline to 2012. EPA's response to the concern that Los Angeles would be required to attain the revised standard in accordance with Subpart 1 "no later than the same year that marks the outer time limit for attaining Subpart 2's one-hour ozone standard" is no response at all. EPA Brief at 49. As the court of appeals found, "[t]hat Los Angeles should also have to attain a more stringent ozone standard by that same year, if not earlier, clearly runs counter to the comprehensive enforcement scheme enacted in Subpart 2." 175 F.3d at 1049; Pet. App. at 41a.

In short, Congress has spoken directly to the issue whether EPA may impose classifications and attainment dates different from those provided in Subpart 2. EPA's attempt to implement a revised standard and, necessarily, to change the classifications and attainment dates found in Subpart 2 is, therefore, unlawful.

3. EPA's revised standard changes the state planning requirements imposed by Subpart 2.

Congress recognized that attainment was going to be extremely difficult, if not impossible, to achieve in some areas. Accordingly, Congress imposed comprehensive planning requirements upon the States to assure strong incentives and continuing progress, but no absolute deadline for final compliance.

First, Section 181 provides classifications and attainment dates for areas that bump up to a higher classification or change from attainment to nonattainment. CAA §181(b)(2), (4); 42 U.S.C. 7511(b)(2), (4). For example, if a Severe area fails to meet the standard by the attainment date, it will become subject to specified sanctions, including a requirement that the State demonstrate percentage reductions "in each 3-year interval after such failure until the standard is attained." CAA §181(b)(4)(A); 42 U.S.C. 7511(b)(4)(A). And, anticipating the possibility that EPA may modify the method of determining compliance with the national standard before Severe areas come into attainment, Section 181 provides that a design value or other indicator comparable to 0.14 "shall be used" to determine applicable sanctions. CAA §181(b)(4)(D); 42 U.S.C. 7511(b)(4)(D).[5]

Section 182 provides for state implementation plan (SIP) revisions and sets out plan requirements for each classification (Marginal through Extreme). CAA §182; 42 U.S.C. 7511a. The scheme begins with requirements for

---

[5] This use of 0.14 ppm as a measurement for determining whether sanctions would apply is yet another indication that Congress intended for the standard to remain at 0.12 ppm.

Marginal areas, and then adds increasingly more stringent requirements for each additional classification. These plan requirements are comprehensive and create several mechanisms by which Subpart 2 will control ozone attainment for the entire 20-year period. They include mandatory control measures, annual rate of progress requirements for emission reductions, and offset ratios for the emissions from new or modified stationary sources. [6] *Id.*

Section 182 anticipates that these requirements will apply well into the future, with no end date in sight. Some of the measures applicable to Severe and Extreme areas did not take effect for years after 1990 and are triggered at various intervals thereafter. *See, e.g.*, CAA §182(e)(3); 42 U.S.C. 7511a(e)(3) (making clean fuels requirements applicable in 1998); CAA §182(g)(1); 42 U.S.C. 7511a(g)(1) (requiring EPA to determine nitrogen oxide reductions in 1996 and at three-year intervals thereafter).

Indeed, Section 182 obviously anticipates that these requirements will continue to apply, not only during the 20-year period before the final attainment date, but until all areas of the country meet the 0.12 ppm standard. For example, Congress established "reasonable further progress" requirements to ensure that States are, in fact, moving towards their goal. CAA §182; 42 U.S.C. 7511a. *See* Senate Debate (January 23, 1990), reprinted in II *1990 Legislative History* at 4837 (statement of Sen. Chafee)("The milestone provisions of the bill are designed to avoid a repeat of the situation that occurred when we passed the 1977 amendments," which allowed States to go for years without

[6] "Nonattainment areas must reduce pollutants by specified percentage increments from the present until the health standard is achieved. This new requirement will ensure early ozone reductions and, for the first time, steady progress toward meeting the standard." Senate Debate (October 27, 1990), reprinted in I *1990 Legislative History* at 948 (comments of Sen. Chafee).

having to demonstrate progress). In addition, by 1992, States were to have submitted an inventory of actual emissions from all sources. CAA §182(a)(1); 42 U.S.C. 7511a(a)(1). Thereafter, "[n]o later than the end of each 3-year period after submission of the inventory . . . until the area is redesignated to attainment," States must submit revised inventories. CAA §182(a)(3)(A); 42 U.S.C. 7511a(a)(3)(A).

These planning requirements implement Congress's intent to ensure continuous state progress toward meeting a specific standard. In contrast, EPA's rulemaking would return the States to the failed compliance scheme that Congress abandoned in 1990, and it would resurrect the historic dilemma the States had in creating a plan to comply with an unachievable standard by a fixed time. Such a scheme not only conflicts with an important part of Congress's overall scheme, but is destined to be unsuccessful once again.

4. EPA's revised standard conflicts with Congress's overall approach to implementating and meeting a national ozone standard.

As described above, EPA's action conflicts in specific ways with key components of Subpart 2: the standard; the classifications and attainment dates; and the state planning requirements. Viewing Subpart 2 in its entirety, moreover, reveals that EPA's action also conflicts with the overall structure that Congress built – its realistic approach to implementing and meeting a national ozone standard.

This Court instructs that "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson*, 120 S.Ct. at 1300. Indeed, it is a "fundamental canon of statutory construction that the words of a statute must be read in their

context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). In addition, a court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson*, 120 S.Ct. at 1301.

Considered as a whole, Subpart 2 represents Congress's answer to a policy question of economic and political importance. It is a balance among the competing needs that blended to form a coherent strategy. And it is a comprehensive response to a complex problem. It is not an open-ended invitation for EPA to reconsider and dismantle Congress's approach whenever and however EPA wishes.

The legislative history of the 1990 amendments supports the conclusion that Congress sought a reasonable, realistic approach for reaching countrywide attainment with the 0.12 ppm standard in light of the fact that past efforts had failed. In 1970, Congress set 1975 as the deadline for meeting the ozone standard. Two years after that deadline, 78 areas were still violating the ozone standard then in place (a one-hour, 0.08 ppm standard). S. Rep. 101-228 (1989), reprinted in V *1990 Legislative History* at 8350. Congress extended the deadline by five years, to 1982. Then, in 1982, areas that had still not met the standard were able to get an extension to 1987. *Id.* Yet, even by 1989, many areas had still not met the 1977 standard. *Id.* at 8351.

Faced with this history of missed deadlines and freely-given extensions, Congress was plainly frustrated by the "widespread failure to meet the ambient standards" that it blamed both upon "States . . . and EPA." *Id.* Moreover, it recognized that leaving implementation methods to EPA discretion simply had not worked. "Predicting future air quality based on assumed control programs is a complicated

undertaking that is susceptible to 'paper' demonstrations of attainment that bear little relation to the likelihood of actual attainment." *Id.* As a result, Congress decided to establish both a realistic standard, the one-hour, 0.12 ppm standard, and the means by which to attain that standard.

The new approach was evident as soon as S. 1630 appeared in the Senate: "The nonattainment provisions of the bill are based on more than 17 years of experience in trying to attain healthy air in all areas of the nation. The deadlines in the bill for attainment are *realistic*, with the ozone deadlines being the longest in recognition of the complexity of the ozone pollution problem. The emphasis in the bill, however, is not on the deadlines but on what happens in the period before the deadlines. *The concept of reasonable further progress* . . . is amplified by requiring specific incremental progress over defined periods for each of the pollutants addressed: ozone, carbon monoxide, and particulate matter (PM-10)." *Id.* at 8352 (emphasis supplied).

Despite Congress's approach, EPA argues that it may, at any time and based on its own policy judgments, impose a new ozone standard, new classifications, and a new attainment date. EPA Brief at 44. EPA's 1997 rulemaking applied the new standard only to areas that had already attained the one-hour standard (a power Judge Tatel, in his dissenting opinion on rehearing, agreed that EPA had). However, EPA now argues before this Court that it has the power to change the standard for any area, including those that have not yet attained the standard pursuant to Subpart 2, and at any time.

EPA's 1997 rulemaking will create three categories of areas: (1) those areas that are in compliance with both the one-hour and the eight-hour standard; (2) those areas that were in compliance with the one-hour standard, but are not in

compliance with the new, eight-hour standard; and (3) those areas that are not in compliance with either the one-hour standard or the eight-hour standard. As to all of these areas, no matter where their compliance efforts stand to date, EPA's action conflicts with the overall approach of Subpart 2, *i.e.*, implementation of a scheme with strong incentives to comply, sanctions for failure to comply, and steady progression to final attainment.

The D.C. Circuit's solution (that EPA may revise the standard and designate areas based on that standard, but may not classify areas or set dates different from those in Subpart 2) does not resolve this conflict and creates even more confusion for the States by allowing two different standards to apply in parallel. In fact, the D.C. Circuit's solution ignores altogether the immediate burdens and significant consequences that follow from revision of a standard, and particularly those that follow a nonattainment designation.[7] For Congress's scheme to have meaning, it must preclude even revision of the ozone standard.

Nonetheless, EPA argues, at pages 49-50 of its brief, that "there is no reason to believe that Congress intended to preclude" EPA from enforcing the one-hour ozone standard and a revised ozone standard at the same time. To the contrary, Congress considered, and rejected, this very approach before enacting the 1990 amendments. The proposed Clean Air Standards Attainment Act of 1987 included a new provision, Section 109(f), which would have authorized the Administrator to "promulgate a national

[7] The consequences that flow from EPA's revision of the standard, particularly those that follow a nonattainment designation, are discussed below, at pages 37-38. *See also* Part II.C. of Respondent ATA's Brief (presenting an alternative argument that even if EPA may revise the one-hour standard, EPA may not designate areas as nonattainment based on a revised standard).

primary ambient air quality standard for ozone concentrations averaged over a period not less than six hours or more than twelve hours in length[.]" S. 1894, 100th Cong., Section 402 (1987), as reported, reprinted in VI *1990 Legislative History* at 9390.

The new six- to twelve-hour ozone standard was to be considered as "a second primary ozone standard . . . in addition to the current one-hour standard. . . ." S. Rep. 100-231 (1987), reprinted in VI *1990 Legislative History* at 9611. Senator Simpson pointed out the illogical nature of such an approach:

> Even a casual observer would conclude that an area that cannot meet the current ozone standard is not going to meet a new "more protective" ozone standard. . . . Yet, under this bill an area which is in the ten-year or fifteen-year ozone nonattainment category would have to commit to all the burdensome and onerous provisions of Title I in order to avoid immediate sanctions only to discover three years later that it must meet a new standard. . . .

Id. at 9780-81 (additional views of Sen. Simpson). The Senate Environment and Public Works Committee reported S. 1894 in November, 1987. However, the Senate did not act on it. *See* S. Rep. 101-228 (1989), reprinted in V *1990 Legislative History* at 8344. Moreover, none of the bills introduced in the 101st Congress that led to the 1990 amendments contained such a provision. This is because the 101st Congress took a new, more realistic approach, that is, meeting the then-existing standard as mandated by Subpart 2.

In short, EPA's action to revise the one-hour ozone standard and to implement the eight-hour standard conflicts

with Congress's comprehensive scheme for ozone regulation, both in its component parts and as reflected in the overall structure. EPA's action, therefore, is unlawful.

B. The Act Offers EPA No Authority To Revise The One-Hour Ozone Standard Or To Implement A New Standard.

Despite these direct conflicts with Subpart 2, EPA argues that it has independent authority under the Clean Air Act to revise the one-hour standard and to implement corresponding planning and operational requirements. No such "general" authority overrides the specific requirements and limitations found in Subpart 2, and EPA's arguments to the contrary should be rejected.

1. The Act offers EPA no general authority to designate ozone nonattainment areas, to classify those areas, or to set dates for attainment of a revised ozone standard.

EPA argues that, when enacting Subpart 2 to implement only the existing one-hour ozone standard, Congress left in place Subpart 1 to govern designations and classifications for ozone nonattainment areas and to set new attainment dates, all based on a revised standard. EPA Brief at 45. Specifically, EPA argues that Section 172(a), 42 U.S.C. 7502(a), which generally governs the selection of classifications and attainment dates, gives it authority to classify areas and to set attainment dates based on a revised ozone standard.

Before reaching Section 172, we begin with Section 107, which provides the general requirements for area designations. CAA §107(d)(1); 42 U.S.C. 7407(d)(1).

Responsibility for initial designations, following the promulgation of a new or revised national standard, lies with the States. Section 107 requires each Governor to submit to EPA a list of all areas within the State, designating each area as: nonattainment, if the area does not meet the standard or contributes to nonattainment in another area; attainment, if the area meets the standard; or unclassifiable, if the area cannot be classified based on available information. CAA §107(d)(1)(A); 42 U.S.C. 7407(d)(1)(A). Once the States submit their lists of designations, EPA must then promulgate the designations within 120 days. CAA §107(d)(1)(B); 42 U.S.C. 7407(d)(1)(B).

Section 107(d)(4), however, sets out specific requirements for nonattainment designations for ozone. 42 U.S.C. 7407(d)(4). That section requires each Governor, within 120 days after November 15, 1990, to submit a list that designates areas as attainment, nonattainment, or unclassifiable with respect to the national ozone standard. CAA §107(d)(4)(A)(i); 42 U.S.C. 7407(d)(4)(A)(i). Once the Governor submits the list, EPA must promulgate such designations within 120 days. CAA §107(d)(4)(A)(ii); 42 U.S.C. 7407(d)(4)(A)(ii). The section also imposes more stringent requirements for ozone nonattainment areas within consolidated metropolitan statistical areas, changing the boundaries of the nonattainment area to include the entire consolidated metro area. CAA §107(d)(4)(A)(iv); 42 U.S.C. 7407(d)(4)(A)(iv).

Section 172 picks up where Section 107 leaves off. Section 172(a)(1) provides that, on or after the date EPA promulgates the nonattainment designations pursuant to Section 107(d), EPA "may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes." CAA §172(a)(1)(A); 42 U.S.C. 7502(a)(1)(A). Section 172(a)(1)(C) specifically provides, however, that "[t]his paragraph shall not apply with respect

to nonattainment areas for which classifications are specifically provided under other provisions of this part [Part D]." CAA §172(a)(1)(C); 42 U.S.C. 7502(a)(1)(C).

As noted, Section 172(a)(1) provides that EPA may classify an area for the purpose of applying an attainment date under paragraph 2. Paragraph 2, which provides generally for implementation of an attainment date for other pollutants, also states, however, that "[t]his paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part [Part D]." CAA §172(a)(2)(D); 42 U.S.C. 7502(a)(2)(D).

In combination, Section 107 and Section 172 expressly exempt from EPA's general authority the power to designate ozone nonattainment areas (under Section 107) or to classify and set ozone attainment dates (under Section 172). Indeed, Section 107 provides specific instruction to EPA for designation of areas for attainment of ozone and Section 172 provides (in two different paragraphs) an express exception for areas for which nonattainment designations are specifically provided under other provisions of Part D. Subpart 2 of Part D, of course, specifically provides nonattainment designations (for areas not meeting the one-hour, 0.121 ppm standard), classifications (Marginal through Extreme), and attainment dates (1993-2010) for ozone. EPA's attempt to ignore these express limitations and to usurp power not granted to it is unlawful.

2. The Act offers EPA no general authority to revise the one-hour ozone standard.

Section 109 of the Act authorizes EPA, within 30 days after December 31, 1970, to promulgate national primary and secondary ambient air quality standards for the

pollutants for which EPA issued criteria, and simultaneously with any future criteria thereafter. CAA §109(a); 42 U.S.C. 7409(a). Not later than December 31, 1980, and at five-year intervals thereafter, EPA is to "complete a thorough review" of the criteria issued under Section 108, 42 U.S.C. 7408, and the national standards "promulgated under this section" and to "make such revisions in such criteria and standards and promulgate such new standards *as may be appropriate* in accordance with [Section 108] and [Section 109(b)]." *Id.* (emphasis supplied).

Here, in light of EPA's inability to designate ozone nonattainment areas, classify ozone nonattainment areas, or set attainment dates for such areas, it was not "appropriate" for EPA to revise the one-hour ozone standard. In fact, a recent EPA action admits as much. In July of this year, EPA issued a final rule that rescinded the eight-hour standard until it becomes fully enforceable and is no longer subject to legal challenge. 65 Fed. Reg. 45182 (2000). EPA stated that because the D.C. Circuit's decision "raised doubts about the enforceability of the 8-hour standard and EPA's ability to implement the standard fully at this time, the basis for the regulation revoking the applicability of the 1-hour standard in certain areas no longer exists." 65 Fed. Reg. 45185 (2000).

The Respondent States agree that if EPA cannot fully enforce the eight-hour standard, it should not be effective. Even more, if EPA cannot enforce a revised ozone standard, it was not "appropriate" for EPA to even revise the one-hour standard. Instead, EPA should have reviewed the one-hour standard and reported to Congress the need to revise it or change the classifications and attainment dates in Subpart 2.

In its brief, EPA argues that the D.C. Circuit's conclusion that EPA may revise the one-hour standard, but must implement it according to Subpart 2 "would lead to unworkable and absurd results." EPA Brief at 47. Other

briefs in support of EPA's position similarly assert that implementation of a revised standard according to Subpart 2 would work "incomprehensible," "nonsensical," and "bizarre" results. Brief of *Amici Curiae* States at 15; Brief of Respondents Massachusetts and New Jersey at 47-48.

The Respondent States agree. Congress simply did not intend for EPA to implement any ozone standard other than the one-hour, 0.12 ppm standard set by Subpart 2, and any implementation of a different standard is unworkable.

As EPA points out, Section 181(a)(1), 42 U.S.C. 7511(a)(1), sets attainment dates and classifications based on an area's "design value," which is an air quality measure that specifically applies to the one-hour standard that was in existence in 1990. EPA Brief at 47. Again, as EPA points out, it makes no sense "and, indeed, would be impossible" to classify areas and to set their attainment dates for the eight-hour standard using an air quality measurement based on the one-hour standard.

In addition, Section 181 sets attainment dates for areas based on a fixed number of years from 1990. As EPA states, "[t]hat timetable makes no sense in calculating attainment dates" for the eight-hour standard. EPA Brief at 47; Brief of *Amici Curiae* States at 15.

EPA's solution to these awkward and unworkable consequences is to ignore altogether Congress's one-hour standard and corresponding planning and operational requirements. Without a revised standard, Congress's instruction in regard to ozone attainment is not unclear, however; nor is it unworkable. In Section 181, Congress codified the one-hour standard; in Section 107, Congress exempted ozone nonattainment designations from EPA's general authority to designate; and in Section 172, Congress exempted ozone nonattainment classifications and attainment

dates from EPA's general authority to classify areas and to set attainment dates. In the place of EPA's general authority, Congress enacted Subpart 2, a comprehensive and sensible approach to ozone regulation.

These provisions leave no doubt that Congress has affirmatively acted to address ozone regulation. Just as Congress acted to address the issue of tobacco and health (*see FDA v. Brown & Williamson*) and to address the issue of long distance telephone services (*see MCI v. AT&T*), it has created a distinct scheme for implementing a specific ozone standard, to the exclusion of EPA. As a result, just as Congress's action precluded the FDA's regulation of tobacco and the FCC's regulation of long distance carriers, so too does Subpart 2 preclude EPA from revising the one-hour standard or implementing a different standard.

In the final analysis, just as in those prior cases, there is no doubt that the problem EPA seeks to address (the regulation of air quality) is significant. "Nonetheless, no matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Brown & Williamson*, 120 S.Ct. at 1315 (citations omitted). In order to "effectuate the congressional purpose of protecting the public," EPA "must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *Id.* (citations omitted).

In Subpart 2, Congress indicated clearly where congressional purpose would stop – at implementation of the one-hour, 0.12 ppm ozone standard in accordance with Congress's plan. EPA may not, therefore, go further, and its attempt to do so is not "appropriate."

III. EPA'S ACTION TO REVISE THE ONE-HOUR STANDARD AND IMPLEMENT A NEW STANDARD WAS A FINAL AGENCY ACTION RIPE FOR REVIEW.

A. The Court Need Not Address The Questions Of Finality Or Ripeness.

In the court of appeals, the petitioning States and industry groups argued that Subpart 2 codified the one-hour, 0.12 ppm standard and provided the exclusive means for ozone regulation; therefore, EPA could not promulgate a new ozone standard. No party, not even EPA, distinguished "revision of the standard" and "designation" from "enforcement" or "implementation" of that revised standard or nonattainment designation. The court, however, did make that distinction. The court held, first, that EPA may revise the ozone standard and, based on that revised standard, may designate areas as nonattainment, but, second, that EPA may not implement the revised standard or otherwise implement the designation in a way that conflicts with Subpart 2.

In its petition for rehearing before the lower court, EPA argued for the first time, as it argues here, that the ozone rulemaking was not a final action ripe for review. Instead, EPA argues, the court's jurisdiction ended with its review of whether the statutory provisions at issue precluded EPA from promulgating the revised standard. EPA's position and the alleged need to address this issue stem from a mischaracterization of the issues before the Court in two important respects.

First, as described above, this case is not simply about *implementation* of a properly-revised rule. Rather, it is about EPA's power to revise the ozone standard at all, *i.e.*, its power to revoke Congress's plan for regulation of ozone and to require States to implement a new and different standard.

Indeed, that is precisely the issue presented and briefed before the court of appeals.

Second, EPA's focus on the preamble and its "explanation" of the rule, as distinguished from the rule itself, suggests that petitioners challenged nothing more than vague statements about uncertain future actions by EPA. But petitioners challenged EPA's entire rulemaking to revise the one-hour ozone standard. That rulemaking included promulgation of 40 C.F.R. 50.9(b), which provides, "The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." 62 Fed. Reg. 38894 (1997). This codification of EPA's implementation of the rulemaking is hardly an undeveloped or unreviewable "explanation" of EPA's intentions.

As EPA concedes, promulgation of an air standard is undoubtedly "agency action" and subject to review under Section 307(b)(1) of the Act, 42 U.S.C. 7607(b)(1). EPA Brief at 34. Thus, considered as a whole and properly framed, EPA's rulemaking leaves no doubt that the issues before this and the lower court – whether, and to what extent, EPA has authority to change Congress's scheme for ozone regulation — are subject to judicial review. Accordingly, this Court need not address EPA's jurisdictional question (Question 2).

B. Consideration Of Traditional Notions Of Finality And Ripeness Leads Inevitably To The Conclusion That EPA's Rulemaking Was Final Agency Action Ripe For Review.

But even considering these issues in the misdirected way EPA has presented them, it is plain that the court of appeals had jurisdiction to answer the questions raised in this case. EPA argues three points: first, the disputed portions of

the rule are not "agency action" within Section 307(b)(1) of the Act, 42 U.S.C. 7607(b)(1); second, they are not "final" agency action because they do not mark the consummation of EPA's implementation process; and third, they are not ripe for review because the issues are "too abstract" at this stage and will not be sufficiently complete until EPA actually implements the new standard. EPA Brief at 34-44. EPA's arguments misrepresent the scope of the rulemaking at issue, ignore the plain language of the Act, are unsupported by relevant precedent, and would, if adopted, represent a drastic departure from well-established principles of judicial review. Therefore, if the Court reaches this question, it should affirm the D.C. Circuit's ruling that it had jurisdiction to address these issues.

1. EPA's rulemaking was "agency action" within Section 307 of the Act.

Section 307 of the Act provides that "action of the Administrator in promulgating any [NAAQS], . . . *or any other nationally applicable regulations promulgated, or final action taken*, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia." CAA §307(b)(1); 42 U.S.C. 7607(b)(1)(emphasis added). This statute broadly includes all nationally applicable regulations and all final action, not just the promulgation of standards.

To overcome Section 307, EPA relies upon the Administrative Procedure Act (APA) definition of an "agency action," 5 U.S.C. 551(13), and court decisions construing this definition to argue that the dispute portions of the final rule are not "agency action." EPA Brief at 36-37. However, even that definition supports the Respondents' position on this issue. As this Court noted in *Federal Trade Comm'n v. Standard Oil*, 449 U.S. 232, 238, n. 7 (1980),

even preliminary agency orders or activities are "agency action" as defined by the APA. Congress intended this phrase to apply very broadly.

> The term "agency action" brings together previously defined terms in order to simplify the language of the judicial-review provisions of section 10 [of the APA] and to assure the complete coverage of every form of agency power, proceeding, action or inaction. In that respect, the term includes the supporting procedures, findings, conclusions, or statements or reason or basis for the action or inaction.

Id., citing S.Doc. No. 248, 79th Cong., 2nd Sess., 255 (1946).

For these reasons, this Court should reject EPA's argument that some portions of the final rule are "agency action" and others are not.

2. The entire rule constitutes "final" agency action that is judicially reviewable.

EPA further contends that the disputed portions of the rule are not "final," even if they are "agency action." It correctly sets forth the two conditions that must be satisfied for agency action to be "final." *Bennett v. Spear*, 520 U.S. 154 (1997). First, "the action must mark the 'consummation' of the agency's decisionmaking process . . . – it must not be of a merely tentative or interlocutory nature." *Id.* at 177-78, citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Second, "the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178, citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970).

Contrary to EPA's suggestion, the court of appeals applied this well-established test and correctly determined that EPA's action meets both elements.

First, EPA's interpretation of Subpart 2 marks the "consummation" of its decisionmaking process. In the preamble to the final rule, EPA stated:

> 4. *Final decision on the primary standard.* After carefully considering the information presented in the Criteria Document and the Staff Paper, the advice and recommendations of [the Clean Air Scientific Advisory Committee], public comments received on the proposal, and for the reasons discussed above, the Administrator is replacing the existing 1-hour, 0.12 ppm primary standard with a new 8-hour, 0.08 ppm primary standard. The new 8-hour standard will become effective September 16, 1997.

62 Fed. Reg. 38873 (1997)(italics in original). EPA explained that this "final decision" represented a change from its original intent to impose the one-hour standard once it had approved state plans for implementing the new standard. *Id.* EPA codified this decision in 40 C.F.R. 50.9(b), from which the petitions below sought review. That section provides, "The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." 40 C.F.R. 50.9(b); 62 Fed. Reg. 38894 (1997).

Second, EPA's promulgation of a revised ozone standard triggered a number of "obligations" and "legal consequences." Section 107 of the Act requires the Governor of each State, within one year after EPA's promulgation of a revised standard, to submit to EPA a list of designations for

all areas in the State. CAA §107(d); 42 U.S.C. 7407(d). If a State does not submit a list, EPA will do so. *Id.* This list of designations then triggers other actions by EPA to promulgate the designations, CAA §107(d)(1)(B); 42 U.S.C. 7407(d)(1)(B), classify the areas, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), and apply attainment dates, CAA §172(a)(1); 42 U.S.C. 7502(a)(1). After EPA completes these steps, each State must develop and implement a plan (a SIP) for meeting the revised requirements. CAA §172(b); 42 U.S.C. 7502(b). Once a state plan is in place, the standard becomes fully effective and results in operational controls imposed directly on sources (such as manufacturing plants, electric utilities, and automobiles).

The "designation" step of implementation is particularly consequential. For instance, Section 173 of the Act imposes requirements for issuing permits to new sources of air pollution in areas designated as nonattainment. 42 U.S.C. 7503. These "new source review" requirements are far more stringent than the permitting rules that apply in attainment areas. *See, e.g.*, CAA §173(a)(1)(A); 42 U.S.C. 7503(a)(1)(A)(requiring emission reduction offsets from existing sources in the region); CAA §173(a)(2); 42 U.S.C. 7503(a)(2)(requiring new sources to comply with the lowest achievable emission rate); CAA §173(a)(5); 42 U.S.C. 7503(a)(5)(requiring analysis of alternative sites, sizes, production processes, and control techniques demonstrating that the benefits of the new source significantly outweigh the resulting environmental and social costs).

The Act also restricts the receipt of federal funds for activities proposed in nonattainment areas. CAA §176; 42 U.S.C. 7506. For these areas, Section 176 prohibits the use of federal funds, most notably federal highway money, for any project that does not "conform" to a state plan. CAA §176(c); 42 U.S.C. 7506(c). For these purposes, a project does not "conform" if it will produce new air quality

violations, worsen existing violations, or delay timely attainment. *See* 40 C.F.R. 51.390; 40 C.F.R. Part 93, Subpart A ("Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws"). The review process necessary to show conformity is long, complex, and costly and results in obvious and detrimental consequences for States and local governments – consequences that flow directly from a nonattainment designation based on a new national standard.

These events that follow revision of an air standard are not mere predictions of what may occur. Rather, each is a certainty once EPA revises a standard. Given such significant, costly, and certain consequences, EPA's suggestion that its rulemaking does not "create rights or obligations" (EPA Brief at 19-20) must fail.

3. EPA's action is ripe for review.

In determining that EPA's action was ripe for review, the court of appeals applied the well-established guidelines of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). As this Court has often stated, the question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149. Here, the lower court determined that the case was fit for review because it presented "a pure question of law, the resolution of which would not benefit from a more concrete setting." 195 F.3d at 9; Pet. App. at 79a.

EPA asks that review of implementation issues be deferred so that it may "work through the various implementation provisions in more concrete settings, reconcile conflicts, make policy judgments, and apply its expertise as necessary to resolve ambiguities in the statute." EPA Brief at 43. EPA's codification of its revocation of the

one-hour standard in areas meeting that standard needs no further consideration. As issues of law, they need not await further development, even if additional interpretation would prove useful. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 201-02 (1983).

Furthermore, the denial of review at this stage would result in serious hardships and legal obligations for the Respondent States. As noted above, EPA's action triggers numerous inevitable requirements under the Clean Air Act. The *certainty* of these requirements forces States and local governments to conduct long term planning, budget sufficient funds, allocate appropriate staff, and spend a portion of the limited governmental resources available for environmental protection – all of which occur once EPA revises the standard. To suggest under these circumstances that EPA's action is "too abstract" for review at this stage is to ignore altogether the realities of EPA rulemaking and the impact upon States and local governments.

Correctly framed, the issues before the Court are whether EPA has the authority to change Congress's scheme for ozone regulation and, if so, how far that authority extends. Given the inevitable consequences of EPA's attempt to usurp such authority, these issues are final and ripe for review.

Indeed, the inevitable consequences flowing from EPA's revision of the ozone standard provide yet another prism through which the full extent of EPA's action can be appreciated. EPA's change to the existing structure was substantial, and the consequences of that change are widespread. For better or worse, however, Congress has spoken clearly and comprehensively to the control of ozone in this country. Congress having spoken, EPA may not abrogate the congressional plan.

CONCLUSION

The EPA rulemaking at issue here changed Congress's scheme for regulation of ozone and, therefore, exceeded Congress's grant of authority to promulgate national air standards. Accordingly, this Court should affirm the decision of the court of appeals on the grounds that EPA was not only without power to implement a revised ozone standard, but it was without power to revise the standard in the first instance. EPA's ozone standard, therefore, should be vacated.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
JUDITH L. FRENCH*
ELISE W. PORTER
JAMES G. TASSIE
Assistant Attorneys General
Office of the Attorney General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 466-2872
Counsel for Respondent State of Ohio

*Counsel of Record

[Additional Counsel Listed on Next Page]

MARK J. RUDOLPH
Deputy Chief
Office of Legal Services
West Virginia Division of
Environmental Protection
1356 Hansford Street
Charleston, West Virginia 25301
(304) 558-9160
Counsel for Respondent State of West Virginia

JENNIFER M. GRANHOLM
Attorney General of Michigan
THOMAS CASEY
Solicitor General
ALAN F. HOFFMAN
PAMELA J. STEVENSON
Assistant Attorneys General
Natural Resources Division
300 S. Washington, Suite 315
Lansing, Michigan 48917
(517) 373-7540
Counsel for Respondent State of Michigan